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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

NIGEL HIDER,

Defendant and Appellant.

B179283

(Los Angeles County
Super. Ct. No. TA074327)

APPEAL from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Affirmed.

William L. McKinney for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Juliet H. Swoboda, Deputy Attorneys General, for Plaintiff and Respondent.

Nigel Hider challenges the sufficiency of the evidence to support his conviction of offenses stemming from an attack at a home in Gardena. He also claims ineffective assistance of counsel and prosecutorial misconduct. We find no basis for reversal and affirm.

FACTUAL AND PROCEDURAL SUMMARY

On the evening of January 10, 2004, gunshots were fired at the home of Bobbie Gean Williams (Bobbie Gean) in Gardena and a Molotov cocktail was thrown onto the roof of the home. Bobbie Gean, her husband, her son Marcelle Williams, Sr. (Marcelle) her two grandsons, and her granddaughter were inside the home. Bobbie Gean and her son, Marcelle identified appellant as the man they saw standing outside the house near a fence. Before the shots were fired, Marcelle saw appellant with a gun pointed toward the kitchen. Witnesses identified Rick Lawson as the person who threw the burning Molotov cocktail onto the roof of the Williams' home, causing damage to the roof and other parts of the residence. Appellant and Lawson were members of the Pay Back Crips gang. Marcelle had refused to join the gang and had been harassed by gang members for several months preceding the January 10 incident. Between December 2003 and January 10, 2004, appellant told Marcelle that he was going to "get" him. We reserve the details of the evidence for our discussion of appellant's challenge to the sufficiency of the evidence to support his conviction.

Appellant was arrested and charged with causing an explosion with intent to murder (count 1, Pen. Code, § 12308)¹; use of a destructive device and explosive to injure and destroy (count 2, § 12303.3); arson of an inhabited structure (count 3, § 451, subd. (b)); shooting at an inhabited building (count 4, § 246); and possession of a firearm by a felon with two prior convictions (count 5, § 12021, subd. (a)(1)). The information alleged that the crimes charged in counts 1, 2 and 4 were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1). As to all

¹ All statutory references are to the Penal Code unless otherwise indicated.

counts, it was alleged that appellant had two previous serious felony convictions pursuant to sections 1170.12, subdivision (a) through (d); section 667, subdivisions (b) through (i); and section 667, subdivision (a). The jury found appellant guilty as charged on counts 2, 3, 4, and 5, and acquitted him on count 1. It found the street gang allegations true as to counts 2 and 4. Appellant admitted one prior felony conviction. He was sentenced to an aggregate term of 24 years 4 months. He filed a timely appeal.

DISCUSSION

I

Appellant challenges the sufficiency of the evidence of identity and to support the criminal street gang enhancement. In considering a claim of insufficient evidence, we must “‘review the entire record, and drawing all reasonable inferences in favor of [the judgment], . . . determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” (*People v. Hughes* (2002) 27 Cal.4th 287, 370.) We will not reverse on this ground “unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*Ibid.*, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 331.) We begin our review with the identity question.

A. Identity

Appellant claims that the testimony of the two principal prosecution witnesses, Bobbie Gean and her son, Marcelle, was inconsistent and not credible. At trial, Bobbie Gean testified that she looked out of her living room window and saw appellant leaning along a wall facing the Hoover Street side of her property. After she saw appellant and reported this to her husband, she heard shots fired. She did not testify that she heard anything on the roof of the house, although she told a police detective, at an interview later that evening, that she had heard something hit the roof before shots were fired.

Marcelle said his mother told him there was a man standing outside in the bushes. In response, he walked outside to investigate. He saw a man standing by the wall outside the backyard, which faced 133rd Street. He could see the man’s hand over the wall,

holding a gun. He stood on tip toe to see the man. At other points in his testimony, Marcelle said that he was standing on the gate when he saw appellant with the gun.

Based on the testimony of Marcelle, appellant questions how Bobbie Gean could have met appellant's eyes. Despite the testimony of Marcelle that he looked over the wall and saw appellant, appellant argues that the wall precluded Marcelle from seeing him.

Appellant makes other claims of inconsistencies. According to Bobbie Gean's testimony, she saw the man, ran to tell her husband, then heard shots fired. She did not say that Marcelle left the house to investigate. Marcelle testified that he went outside before the shots were fired. Appellant also cites inconsistencies as to whether Marcelle had to stand on a rock to see the shooter on the other side of the wall.

Our review of the record establishes that Detective Patricia Batts, the investigating officer, asked Marcelle to show her how he saw appellant on January 10 so she could take a photograph. Marcelle stepped on a rock and looked over the fence. Batts testified that she assumed that this was how he saw appellant on the night of the firebombing. Marcelle did not tell her that this was what he did that night. Before the preliminary hearing, Marcelle corrected her assumption that he had stood on the rock. She did not correct her police report because the issue was addressed at the preliminary hearing. Delores Holland, a neighbor, testified that she saw a man near the fence throw something onto Bobbie Gean's roof. After throwing the object, the man ran down the sidewalk, shooting over the fence. Ms. Holland saw the man run down the alley. She did not mention seeing Marcelle outside the house at the time.

Appellant also claims inconsistencies in Bobbie Gean's description of the shooter. Bobbie Gean was not certain the shooter had facial hair, but Marcelle said the shooter had a mustache, beard, and sideburns.

Robert Hernandez, a City of Los Angeles Fire Department arson investigator, testified that Bobbie Gean told him she saw defendant's face just before defendant pulled something over his face. He asked Bobbie Gean, "was it some type of, like, a beanie or something, and she indicated, yes." Hernandez stated that "beanie" was his word, but

that Bobbie Gean agreed with it. Hernandez also interviewed Marcelle. According to Hernandez, Marcelle told him that he was still inside the house when he heard shots. This is contrary to Marcelle's testimony on direct. Marcelle also told Hernandez that he heard something land on the roof, heard the gunshots, and then went outside.

There was evidence of a previous attempted firebombing at the Williams' home. Appellant cites confusion about the two incidents to question the credibility of Bobbie Gean and Marcelle. Our review of the evidence demonstrates that this was fully explored, and that the confusion seems to have been primarily on the part of the investigating officers.

Finally, appellant claims that the Williams family witnesses were motivated to identify him as the perpetrator despite his innocence because Marcelle had been harassed by members of appellant's gang and had been robbed and beaten by appellant and another gang member.

Detective Batts testified that the fence where Marcelle saw appellant has three levels, each between eight to twelve inches lower than the previous section. Marcelle also explained the different heights of the fence. He explained that he was able to look over the fence and see appellant. Detective Batts explained that she had made a mistake in her police report when she said that Marcelle had to stand on a rock to see over the fence. Marcelle had known appellant for more than 14 years, and was positive in his identification. Bobbie Gean testified that she looked directly at appellant and was positive in her identification. In addition, the neighbor, Ms. Holland, testified that she saw a single person throw the firebomb onto the Williams's roof and then start firing a gun.

The defense fully developed these inconsistencies and bases for witness impeachment, both in cross-examination and in closing argument. The jury was charged with resolving the inconsistencies between the trial testimony and out-of-court statements, as well as other bases for possible impeachment. (See *People v. Cuevas* (1995) 12 Cal.4th 252, 273.) The testimony of a single witness is sufficient evidence to support the verdict. (*People v. Zavala* (2005) 130 Cal.App.4th 758, 766.) Substantial

evidence supports the verdict. Appellant presented an alibi defense, with evidence that he was attending a party at the time of the shooting. But the prosecution was able to establish that the party was within four-tenths of a mile of the Williams's home, which made it possible for appellant to leave the party briefly and commit the crimes.

B. Gang Enhancement

The jury found that the crimes of use of a destructive device to injure and destroy (§ 1203.3) and shooting at an inhabited dwelling (§ 246) were committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1). The prosecutor was required to prove that the crimes were “‘committed for the benefit of, at the direction of, or in association with any *criminal street gang*’ and the defendant must have committed the offense with ‘the specific intent to promote, further, or assist in any criminal conduct’ by members of the street gang.” (*People v. Gardeley* (1996) 14 Cal.4th 605, 615-616.)

Appellant argues the specific intent element was not proven beyond a reasonable doubt. He asserts: “There was nothing in the evidence that the expert witness could point to, supporting the notion that the home was firebombed on the orders of the gang, or how firebombing as well as shooting benefited the gang.”

We disagree. Marcelle testified to a pattern of harassment by members of appellant's gang in the months preceding the January 10 crimes. He repeatedly was asked to join that gang and refused. Appellant and a companion had robbed and beaten Marcelle in the fall of 2003. There was another altercation between appellant and Marcelle a few days later.

Los Angeles Police Officer Charles Hicks testified as an expert on the Pay Back Crips gang. Appellant had admitted membership in this gang to Officer Hicks. Officer Hicks testified that the crimes of throwing a firebomb on the roof of a dwelling and shooting into the dwelling would benefit the gang by creating an atmosphere of fear and intimidation within the community. According to the officer, Marcelle's refusal to join the gang, and history of disputes with appellant and members of the gang supported his

conclusion that these crimes were committed to benefit the gang. The crimes were committed in Pay Back Crips territory.

This is substantial evidence from which the jury could conclude that these crimes were committed to benefit a street gang with the requisite specific intent required by section 186.22, subdivision (b)(1). (See *People v. Gardeley*, *supra*, 14 Cal.4th at pp. 619-620.)

II

Defendant claims ineffective assistance of counsel and prosecutorial misconduct because evidence of an attempted arson at the Williams home on January 14, 2004 was admitted in contravention of an agreement reached before trial to exclude such evidence. The trial court told the prosecutor to admonish her witnesses to refrain from mentioning the second arson attempt.

Despite this agreement, evidence of the other attack was presented to the jury. On direct examination, the prosecutor asked Investigator Hernandez about his interview with Bobbie Gean. The prosecutor asked whether Bobbie Gean told him she had seen anyone on the night of January 10, 2004. Hernandez answered: "On which night? I'm not positive which one she identified seeing him." The prosecutor responded: "What do you mean on which night?" Hernandez said: "There were two separate instances at this location. There was a lot of confusion as far as which night things happened, from the first fire or the second fire." The prosecutor then said: "Well, there wasn't a second fire. There was no second fire." Hernandez said: "That's correct. We called it as an attempt --" The prosecutor then interrupted and said: "Well, there was no second fire; is that correct." Hernandez replied: "That's correct."

The prosecutor went on to establish that Hernandez spoke to Bobbie Gean on the 15th. Hernandez said: "I was asking her both on particular dates, and some of the stuff was in general." On cross-examination, when Hernandez was asked if he had recovered the wick from the firebomb, he twice said "not from that fire, no." On redirect, the prosecutor asked whether Hernandez had interviewed Marcelle about two separate incidents. Hernandez said they had talked about two events. On recross-examination,

defense counsel confirmed that Hernandez asked Marcelle about two different dates. In response to a question about the January 10 incident, Hernandez volunteered that both incidents involved shootings. There was no objection, motion to strike, or request for mistrial. Defense counsel did not seek corrective instructions.

A. *Misconduct*

We first address appellant's argument that the prosecutor committed misconduct in gaining admission of testimony about the second attempt, and by failing to properly admonish the witness to avoid the subject.

“““A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” (*People v. Espinoza* [(1992)] 3 Cal.4th [806,] 820.)’ (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 [64 Cal.Rptr.2d 400, 938 P.2d 2] (hereafter *Samayoa*).)’ (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

We are satisfied that the initial revelation of the second attempt by Hernandez was not caused by the prosecutor. The first question was specifically limited to the events of January 10. The pattern of questions establish that the prosecutor repeatedly attempted to limit Hernandez to the January 10th event, and did not encourage him to bring the second incident before the jury. Hernandez, apparently confused, injected statements about the second event. While the prosecutor possibly could have been more effective in admonishing Hernandez or by seeking a recess to remind him of the admonition, we conclude that the record does not establish misconduct under either the federal or state standards. We turn to appellant's claim of ineffective assistance.

B. *Ineffective Assistance*

Appellant argues his attorney was ineffective in failing to object to the evidence of the second incident. He also claims that counsel failed to take other corrective measures,

such as seeking to strike the testimony, moving for a mistrial, or requesting unspecified corrective instructions.

“Deciding whether to object is inherently tactical, and the failure to object will seldom establish incompetence. [Citation.]” (*People v. Carpenter* (1997) 15 Cal.4th 312, 396.) ““In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was ‘deficient’ because his ‘representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citations.]” (*In re Harris* (1993) 5 Cal.4th 813, 832-833 [21 Cal.Rptr.2d 373, 855 P.2d 391].) ‘[T]here is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” [Citation.] Defendant’s burden is difficult to carry on direct appeal “Reviewing courts will reverse . . . only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.”’ [Citation.]’ (*People v. Lucas* (1995) 12 Cal.4th 415, 437 [48 Cal.Rptr.2d 525, 907 P.2d 373].)” (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1212.)

We cannot conclude that defense counsel had no rational tactical purpose in not objecting to the evidence of the second attempt or seeking other corrective action. The references to the second incident did not implicate either appellant or members of his gang. Few details about that second incident were given. Appellant’s trial counsel may very well have concluded that the best approach was to downplay the evidence. Defense counsel vigorously cross-examined Hernandez and other prosecution witnesses. The eyewitness testimony of Bobbie Gean and Marcelle identifying appellant as the perpetrator of the crimes of January 10, 2004 was extremely strong. Appellant has not demonstrated ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

CURRY, J.

HASTINGS, J.*

*Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.